

CHALLENGES FOR THE FUTURE

Michael Ignatieff*

Toronto

One of the most interesting changes in Canada in the last two decades has been the extraordinarily increased salience and visibility of the Supreme Court as a body for regulating political and moral conflict in our society. Name a controversial issue in our political life and the Supreme Court has had to rule on it: signage and language policy in Québec; aboriginal rights and aboriginal title; gay and lesbian rights. Even the rights of Québec to secede from the federation, and the obligation of both parties to negotiate in good faith in such an eventuality have come before you.

In one obvious way, Canada owes this change to the man whose death the country mourns today, Pierre Eliot Trudeau. The *Charter* he did so much to anchor in our constitution in 1982 is the obvious reason why you weigh so much more heavily in the institutional balance of the country. While there are examples throughout Eastern Europe of new democracies adopting new constitutional arrangements, it's hard to think of a mature democracy other than Canada that has changed the constitutional rules of the game in so fundamental a way. After more than a century of British parliamentary supremacy, Canada has moved to a rights based democracy in which rights challenges to legislation and administration can be taken right up to the Supreme Court.

The *Charter* is not the only reason why you have more work and more importance. As almost everyone has noticed, matters that might have been settled politically without recourse to constitutional challenge or clarification are now ending up before you. Is this because politicians are kicking controversial issues that they used to solve up to you? Or is it because the political system itself is incapable of regulating its own ongoing institutional crisis? Canada's levels of government do not get on, and as this ongoing constitutional conflict continues, especially but not exclusively with Québec, matters political inevitably end up as matters constitutional.

Some commentators worry that you've got too much power. These criticisms come from the right, and from the left of the political spectrum in Canada. There are two objections to your increased role. One is that you've encroached on the political domain. The other is that your decisions have advanced particular agendas. To the left in Canada, you are thwarting the will of the people and you're much too conservative in your interpretation of property rights; to the right, you are too indulgent

* Michael Ignatieff, of Toronto, Ontario. An Address given 29th September, 2000, at the Symposium for the Supreme Court of Canada.

with morally permissive causes, like same sex rights. Your rulings have made you the avatar of the permissive revolution to some, and the avatars of judicial despotism on the other.

So your job has become controversial. From my perspective, these critiques blame you for too much. It's not obvious to me that any consistent moral agenda, permissive or otherwise, other than enhancing the rule of law can be read into your decisions since 1982. So calling you conservative, liberal, permissive or otherwise seems to this outsider to miss the point. Secondly, you do have more power but that's hardly your fault. Your job is to restrain executive power, along with Parliament, and if Parliament isn't doing that job, then you have to do more of it.

So as you turn 125, you have more power and influence than those who created you could ever have imagined. But it's troubling power, because nobody is entirely sure where it is taking the country: too much power for the judiciary is undoubtedly a bad thing; too little is also bad. Nobody exactly knows how much power for your Court is the right amount. You've gained power because you are seen to have the legitimacy to decide the hard cases that go to the root of our country's unity as a nation and as a moral community. Legitimacy has flowed away from Parliament to you. You may not wish this, but this seems to be what has happened.

Yet your legitimacy is uncertain because the political system is still reacting to the new balance of power between legislature, executive and judiciary that has resulted from the creation of the *Charter*. So you are in business of safeguarding the legitimacy of our state while also attempting to safeguard and enhance your own. In defending your authority, you have many audiences to reach. Your judgments have to convince the legal profession—so you have to be good lawyers; secondly, you have to be good politicians: you've got to have a sense of what the country needs from you, how far you can broach issues of policy and essential political choice; third, you have to carry the country with you, ordinary citizens who look to you for justice. These roles conflict: because you have to speak in a different voice to each of these groups. Elegant legal reasoning may win you plaudits—and legitimacy—from the audience of fellow lawyers and jurists. But clever legal reasoning that is politically obtuse can cost you support and legitimacy from the legislative and executive branches; and clever legal reasoning that does not make sense to ordinary Canadians will cost you legitimacy among your fellow citizens.

Your legitimacy problem is much more than a matter of getting your language right for each audience. It's also a matter of balancing competing political, legal and moral claims. You may wish you didn't have to balance. You may wish to keep your process of legal deliberation free of contamination by political and policy issues. But this is a longing for purity and abstraction that will lead you wrong in the end. You aren't politicians, but you are in the business of bringing justice and fairness to political issues. So political wisdom is as important as juridical wisdom on the bench. On the other hand, you can be too political, too savvy about what the traffic will bear, and neglect fundamental

principles of legal consistency not to mention natural justice. Finally, you need to carry your citizens with you: that means speaking to them in a language that they understand. But it doesn't mean courting their favour or still more seeking to bow to public prejudice. The public's moral intuitions are often wrong, in principle and in detail. Just as Parliament is often wrong, in principle and in detail. Your job is to maintain a balance between three competing sources for justice: the law itself, democratic authority and the popular will. You can't depend on any single source for your judgments; you need to bear all three in mind. I don't envy your job, but as a citizen, I respect the job you've tried to do.

We can't understand the growing power of the Court simply within an Ottawa-based perspective that focuses on the ebb and flow of power between the executive and legislative branch. We have to look instead at the way in which rights talk has penetrated every nook and cranny of society. One way to understand why the Supreme Court is so much more salient and central to the exercise of power in Canada is to see that the whole country has been through what I call, in my forthcoming Massey Lectures, "the rights revolution."¹

The rights revolution began before the *Charter* and the *Charter* can be seen in some sense as its product or logical result. The revolution in question has been the explosion of rights talk and rights claims in Canadian life. Never has rights talk so monopolized the Canadian language of the public good. Rights became the key language in which women, children, gays made claims against the family order of the 1960's; it became the way, through treaty negotiations, that aboriginal peoples advanced claims for dignity and equality and self-government, and it became the chief way in which Québécois citizens sought to protect their language. The Supreme Court's increased importance in Canadian national life is a direct result of this amazing proliferation of rights talk, and its consequence tendency to turn all conflicts of interests into conflicts of rights susceptible to judicial interpretation and adjudication.

This, of course, is a global phenomenon. I start my own account of the origins of the rights revolution to 1948 and the passing of the Universal Declaration of Human Rights. It gave rights to individuals for the first time in international law, and it spawned the huge extension of international human rights instruments and institutions ever since. One consequence for you has been the globalization of jurisprudence. In a world increasingly pulled together by human rights covenants and norms, rights practice and interpretation in one country rapidly spread to another. Canada has become a net exporter of its own homegrown rights' talk. It's no accident, as the *Globe and Mail* recently reported, that when the Chief Justice found herself at a judicial training college in China, she discovered they were reviewing Canadian cases. Just as it is no accident that on a recent visit to South Africa's Constitutional Court, I found the

¹ See also C.R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); also M.A. Glendon Rights Talk, (New York, Free Press, 1990). See my, *The Rights Revolution* (Toronto, Anansi, 2000).

judges citing the Canadian Charter as part of their search for precedents. Indeed, their constitution explicitly mandates looking outside their jurisdiction for best practice.

When I was serving on the Independent International Commission on Kosovo, chaired by Justice Goldstone, and we were considering the vexed question of whether Kosovars had a right of secession, the international lawyers we consulted all agreed that we had to read the then recent Supreme Court decision on secession. One-way to explain the growing international importance of the Court's decision is negatively: we have the problems the rest of the world needs to solve. We have an ongoing problem with secession, with the legitimacy of our federation. We have 140 years of experience trying to make a multi-national, multi-lingual federation work. Our jurisprudential thinking reflects the imprint of this struggle. This experience is suddenly very relevant to the new states that are trying to hold differing nations and languages together inside fragile legal orders. Our very vulnerability as a nation, our constant need to improvise group rights solutions to keep the country together, turns out to be a comparative advantage in the world market for legal expertise. We've become experts in the new arts of constitutional survival. Will Kymlicka from Queens goes around the world advising governments about minority rights and group rights; Canadian lawyers with the OSCE have been working in the Baltic states to entrench minority language rights protection into the new constitutions of these states. Whenever political philosophers gather to discuss multiculturalism and minority rights, they are certain to quote McGill's Charles Taylor on the need for rights regimes to accord recognition to the collective identity of minority peoples within a state. If you go to Sri Lanka, as I did recently, you spend your time discussing whether it is too late to use Canadian federalist principles of devolution as a constitutional solution to the ghastly conflict between Tamils and Singalese in that beautiful island. If you go to Australia and New Zealand, you discover quickly how attentive they are to Canadian court decisions and academic thinking on aboriginal title and aboriginal rights.

To repeat, the world is interested in us because we have the world's problems—how to make a multi-cultural, multi-ethnic, multi-national, multi-lingual state cohere in an age of rights. For these problems, our rights traditions are sometimes more relevant than the more individualistic and unitary rights traditions from which our own descends, that being the French, British and American traditions.

Our foreign guests were kind enough to flatter us last night with references to our relevance to their problems. But we Canadians do not pay sufficient attention to a notable consequence: our rights traditions may appear distinctive and attractive to outsiders, but most Canadians don't seem to notice. Until the era of the Charter, Canadians thought of the land as the primary source of our identity. We still do, but increasingly the distinctive feature of our culture is how we rule the land. Our rights traditions are what make us distinctive. They are the very source of our identity as a people.

There are five obvious ways in which we are a distinctive rights culture. First, we have a secular, non-transcendental rights approach that translates into moderate and permissive stances on such issues as capital punishment and abortion. Second, because our national development absolutely required state investment in infrastructure and development, we are a nation created by our state. For this reason, we cannot conceive of individual rights without the supporting institutional integument of the state. We take it as axiomatic that our citizens have rights to government programs, chief of which is free medical care. Third because we are a nation with linguistic and aboriginal minorities, we have had to develop group rights regimes that differ significantly from the more individualistic rights of British common law and French civil law. Fourth, because our political stability is never secure and assured, we have developed a distinctive approach to rights of secession, explicitly defining the terms and processes of divorce in advance in order, precisely, to make divorce less likely. Fifth, because we are a nation composed of nations, Québec, English Canada and the aboriginal peoples, we are struggling centrally with the issue of reconciling substantial autonomy and self-government for nations with the juridical unity of Canadian citizenship and the primacy of Canadian law.

These five distinctive features are not fixed in stone. Indeed each feature could be re-described as a site of conflict and a test of our capacity to endure as a separate nation state. But they are what make us who we are as a people. So rights are central to our identity in special ways. Putting the same point more starkly, Canada is not held together by much else. There are now 75 mother tongues spoken by the students in the Toronto school board. I suspect the same is true in Montréal and Vancouver. If this is the case, then it is rights not roots, values not origins that hold our country together.

This presents a special challenge to any court that is charged with the protection and enhancement of our rights. For our rights are so central to our identity and so crucial to our unity that no purely legal adjudication of their conflicts is ever possible here.

When a fisherman claims exemption from Canadian fisheries protection legislation on the basis of a very ancient aboriginal treaty, and the Court rules in his favour, the ruling has some very non-judicial consequences. The stage is set for confrontation between two groups of Canadian citizens and between them and the federal government. This conflict—at Burnt Church—if not resolved threatens to poison relations between our founding peoples in the same way that Oka did. The court is not to blame for this poison. Still, it must bear responsibility for the political and social consequences of its rulings, which in our country go to the very question of the viability of our political union.

Your chief challenge as Justices is how to maintain the legitimacy of your court in a country where rights are so tightly tied to identity, and where identity issues challenge the very unity of the country. You can't take refuge, if you ever could, in legal abstraction. Insulating your decisions from the turbulence of politics and competing identity claims is no solution. At the same time, you

cannot descend into the political bear-pit. You must listen to the people; you must listen to the politicians; and you must listen to the law. All three may tell you very different things.

That's your challenge. But you're the best we've got. And so we expect great things of you.

These expectations are part of your challenge. We the citizens have put enormous pressure on you to lead us to justice and to defend the rule of law. One of your problems in meeting these expectations is the gulf that exists between the rule of law as you cherish it in your chambers and the often grim reality of law as your citizens experience it. You cannot insulate yourselves from what happens in our police cells, from what happens in our prisons, from the often imperfect, casual even brutal way justice is meted out in our society. The rule of law is not an abstraction: it's a machine, and every day, it grinds out outcomes that many of our citizens feel express contempt for them rather than respect. One central reason why Canadian citizens of aboriginal descent are challenging the law of the land in Burnt Church is that they have good reason to believe, from their own experience, that the practical operation of the Canadian law has not paid much respect to them.

Everyone in this room loves the law: it's more than a machine to us. It incarnates the values we believe in. As I've said, it also incarnates our identity as a people. But the legitimacy of that identity—and the legitimacy of the institution of the Supreme Court—depends on much more than our attachment to the ideal in this room. It depends on whether justice is done and being seen to be done, every day of the week, for every citizen, in every court, in every police lock up in every prison in the land. Who can honestly say that our country actually lives up to the standards of fairness and due process that the rule of law commits us to?

So you are in the legitimacy business, and your chief challenge as a Court is to respond to the intense investment we all have in the rule of law as the very principle of our national cohesion as a society. Responding to this challenge simply by writing clever, clearly crafted rulings that excite the experts will not be enough. You have not only to listen to the people; you have to speak to them. Make sure your language is clear enough for every citizen to understand. Make sure that they know what principles are at stake. And more than that take care when you speak of the rule of law in this country that our institutions actually measure up to the promise. For our very survival as a people depends on whether they do.